Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

MAJOR GLENN FARRISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hobbs Act, 18 U.S.C. § 1951, imposes criminal penalties on "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . or commits or threatens physical violence . . . "

The QUESTIONS PRESENTED in this case are:

1. Whether the constitutional and jurisdictional facts supporting application of the Hobbs Act to a local robbery of an automobile are to be evaluated by a jury or by an appellate court exercising its independent *de novo* review powers?

2. Whether an unarticulated jury inference that a local robbery has interfered with interstate commerce can justify application of the Hobbs Act?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Major Glenn Farrish, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this criminal proceeding.

OPINION BELOW

The opinion of the Second Circuit, rendered on August 27, 1997, is officially reported at 122 F.3d 146. It is reprinted in the Appendix hereto, App. 5, *infra*. No opinion was issued by the United States District Court for the Southern District of New York.

JURISDICTION

The Second Circuit issued its judgment and opinion on August 27, 1997. Petitioner filed a timely petition for rehearing, together with a suggestion for rehearing *en banc*. The Second Circuit denied both the petition and the suggestion on October 8, 1997. That denial order is reprinted in the Appendix hereto, App. 1, *infra*. This Petition is being filed within 90 days of the date of that denial order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution, Article I, Section 8, clause 3:

> [The Congress shall have Power] . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Hobbs Act, 18 U.S.C. § 1951, Interference with commerce by threats or violence:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> * * *
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

The important issues in this case concern the outer constitutional and jurisdictional reaches of the Hobbs Act, 18 U.S.C. § 1951. The Act is designed to punish those who "in any way or degree" obstruct, delay, or affect commerce, or the movement of any article or commodity in commerce, by robbery or extortion or threats of physical violence. Two questions here arise:

(1) Who is to decide whether there has been an interference with commerce, the jury or the appellate court?

(2) Can the requisite "any way or degree" of obstruction or interference consist solely of an unarticulated jury inference that interstate commerce might have been obstructed by a local crime of robbery?

A. THE FACTS

The facts are clear and undisputed. Petitioner's legal saga has both state law and federal law chapters. On September 12, 1995, he was arrested by a New York City police detective and charged with having committed two robberies of automobiles parked in the Chelsea Parking Garage in Manhattan, all in violation of the New York State Penal Law. Tr. 274.[1] In addition, the New York City Police Department conducted a critical part of the investigation of the robberies and later testified at Petitioner's Hobbs Act trial in the federal court. Tr. 263-311, 312-15. It

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[1] In this petition, the page numbers preceded by "Tr." refer to the trial transcript. The references to "A-" are to the appendix filed on the appeal to the Second Circuit.

also appears that FBI agents, using a confidential government informant who knew the Petitioner, had conducted a "sting operation" to induce the Petitioner to sell the automobiles he had allegedly stolen from the Chelsea Parking Garage. Tr. 104, 107-10, 112-13, 114.

Petitioner's federal woes had begun on August 18, 1995, when a federal grand jury in the Southern District of New York indicted Petitioner on four counts of conspiring to violate as well as violating the Hobbs Act. A-9.

The four counts were:

Count One: Petitioner and "others known and unknown" were charged with conspiring to violate the Hobbs Act by taking "cars from the Chelsea Parking Garage, a commercial parking garage in New York, New York" and by threatening the garage employees "with physical violence." A-10, 11. The alleged overt acts occurred on April 15, 1995, and April 30, 1995. A-10. The jury found Petitioner "not guilty" of this conspiracy count.

Count Two: Petitioner and "others, known and unknown," were charged with knowingly obstructing, delaying and affecting commerce and the movement of articles and commodities in commerce by taking, on or about April 15, 1995, "from the Chelsea Parking Garage an automobile, punching one of the attendants in the stomach." A-10. Petitioner was found guilty on this count.

Count Three: Petitioner and "others, known and unknown," were charged with another Hobbs Act violation by taking, on or about April 30, 1995, "from the

Chelsea Parking Garage four automobiles, threatening the employees with a firearm." A-10, 11. Petitioner was found guilty on this count.

Count Four: Petitioner was charged with using and carrying a firearm during the April 30 robbery as set forth in Count Three. A-11. Count Four was later dismissed by the trial judge because of insufficient proof.

Petitioner thus was found guilty of stealing a total of five automobiles, one on April 15 and four others on April 30. There was no proof that any of these five cars were owned by other than New York state residents, or that any of the cars were registered out-of-state or bore out-of-state license tags. Moreover, the one automobile stolen from the Garage on April 15 was later found parked on a New York City street. There is no record of the fate of the other stolen vehicles.

The Government's theory of prosecution, as well as its theory of what constituted the Hobbs Act violations in this case, was that (1) the Chelsea Parking Garage, by accepting a few out-of-state cars, is a facility engaged in interstate commerce, and (2) the theft from the Garage of the five locally owned cars in some "way" or "degree" affects that commerce within the meaning of the Hobbs Act.

According to the Government's brief in the Second Circuit, p. 3, the evidence at trial "showed that the Chelsea Parking Garage is located at 170 West 23rd Street in Manhattan, and that 23rd Street is a major east-west thoroughfare carrying two-way traffic and easily accessible from, inter alia, the Lincoln and Holland Tunnels." But there was no proof or claim that any of the five stolen

automobiles had recently been driven through either tunnel in accessing the Chelsea Parking Garage, or was parked there pending an imminent journey across state lines.

The Chelsea Parking Garage is actually located in the basement of an apartment building at the West 23rd Street address, between Sixth and Seventh Avenues in the Chelsea section of Manhattan. As the Government's brief below acknowledges, p. 4, the evidence showed that the Garage "has between 100 and 105 parking slots, approximately eighty of which are reserved for customers who enter into monthly contracts." Many of those contract customers reside in the apartment building above the Garage or in the nearby area. The remaining twenty or so slots are available for transient daily parking customers.

The Government's brief, p. 4, also asserts that about 25 to 40 of the 80 monthly contract customers "parked cars at the Garage bearing out-of-state license plates, most being from either Connecticut or New Jersey." But as evidenced at trial, a review of all the contracts for monthly customers showed that the large majority of cars with out-of-state license plates actually are owned by New York residents. Tr. 41-44. Computed on a daily basis, the number of parked transient cars bearing out-of-state license plates was shown to average five cars per day. Tr. 33, 34, 37.

In sum, the vast majority of the cars parked at the Chelsea Parking Garage belong to New York residents, including most of the cars bearing out-of-state license plates. Located in an apartment building, the Garage is only licensed to do business in New York City and its

patrons pay a local New York City tax. There was no evidence that the Garage ever advertised itself as available for out-of-state parking customers, or in any other way considered itself an interstate facility. The Garage is locally owned and operated.

Moreover, there was no evidence, no indication, that any out-of-state drivers, aware of the fact that automobiles had been stolen from the Chelsea Parking Garage, were thereby discouraged from driving across state lines in order to park at that Garage. Indeed, there was no evidence whatever that the two robberies had been reported or publicized in any of the news media that out-of-staters might have read or heard.

Finally, there was no evidence or claim that the Chelsea Garage itself had suffered any loss of business or profits, or bore any responsibility, or incurred any liability, for the robberies of the five automobiles. As District Judge Sprizzo charged the jury, "the cars did not belong to the garage attendants, nor in fact did they belong to the garage. They belonged to the individuals who placed their cars there either by the day or the month." Tr. 388.

B. THE PROCEEDINGS BELOW

1. In the District Court

Before trial, Petitioner's counsel moved to dismiss the indictment for lack of federal jurisdiction. While Judge Sprizzo denied the motion, he expressed grave misgivings about whether these local robberies came

within the jurisdictional reach of the Hobbs Act. In his words,

> This looks like an ordinary state violation. Why isn't it being prosecuted locally? I don't understand that. . . . If your argument is carried to its logical extreme, then every robbery in a supermarket parking lot would also come under the Hobbs Act because there are interstate cars there. . . . I really wonder why your office feels the need to prosecute federally when it is so obviously an armed robbery under state law. Why? Even if technically it is a Hobbs Act violation, I am curious as to why the government is doing this.
>
> . . . What do you want. To usurp the whole world? Don't you have enough to do. . . . If the federal government is so busy, why don't you let the state deal with it? I'm sure Mr. Morgenthau would love to have that case. Hearing Tr. 13-14, 16-17. Especially in light of *Lopez*, I think that you are just inviting some very bad law; and if you want it, I think you are going to get it, whether you get it in this case or in the next case. Hearing Tr. at 17.[2]

Even though Judge Sprizzo denied the motion to dismiss the indictment "in light of *Lopez*," he allowed the federal prosecution to proceed only "if the government can prove that this garage is in commerce, in the sense that more than a *de minimis* part of their business is . . . to

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[2] The citations to "Hearing Tr." are to the December 10, 1995, hearing on Petitioner's motion to dismiss the indictment on the basis of this Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

the extent that the government wants to prove that there are out-of-state cars in this garage and they come on a daily basis, which is pretty strong proof, by the way, that the garage is in commerce or nearly so, then as far as I am concerned this would be an appropriate case for the Hobbs Act, even in the face of *Lopez*. . . . It is a fact-sensitive determination." Hearing Tr. at 18-19.[3]

In his subsequent charge to the jury, Judge Sprizzo asserted that a Hobbs Act violation is not "limited to conduct which directly and immediately obstructs the movement of goods in commerce, nor is it necessary that commerce actually be affected by the defendant's conduct." Charge, p. 391. It is sufficient, he charged,

> if the conduct has a potential effect upon commerce. It does not have to be a substantial effect upon commerce. It can be a rather minimal effect upon commerce. But you must find that the conduct was of such nature as to affect commerce in some way, either actually or potentially. Charge, p. 391.

The jury's verdict, finding Petitioner guilty only under Counts Two and Three, did not specifically indicate whether Petitioner's conduct did "affect commerce in some way, either actually or potentially." But the jury's "not guilty" verdict on Count One, the conspiracy count, effectively eliminated any analysis or application of the Hobbs Act in terms of a conspiracy.

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[3] This Hearing Transcript citation is to the Jurisdictional Hearing held on January 10, 1996, wherein Judge Sprizzo denied Petitioner's motion to dismiss the indictment on the basis of *Lopez*.

2. In the Second Circuit

Following Petitioner's convictions on Counts Two and Three, he was sentenced to 100 months imprisonment, a three-year term of supervised release, and a $50 special assessment on each count. The timely appeal to the Second Circuit followed in due course.

In an opinion by Circuit Judge Cabranes, joined by Judges Calabresi and Parker, the Second Circuit affirmed the judgment of conviction. At the opening of the opinion, the Second Circuit wrote (App. 6, *infra*):

> In this appeal, we address whether the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), raised the threshold for satisfying the jurisdictional element of the Hobbs Act, 18 U.S.C. § 1951 ("Hobbs Act" or "Act"). We hold that *Lopez* did not alter the long-standing rule that the Government need only demonstrate a *de minimis* effect upon commerce to establish jurisdiction under the Act.

In elaborating that holding, the Second Circuit endorsed the following propositions:

1. The reach of the Hobbs Act has been held to be coextensive with that of the Commerce Clause, citing this Court's decision in *Stirone v. United States*, 361 U.S. 212, 215 (1960). App. 9, *infra*.

2. Quoting from its own precedents, the Second Circuit stated that the jurisdictional requirement of the Hobbs Act "may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice." App. 9, *infra*. The court also quoted from its own precedents to the effect that

Hobbs Act jurisdiction is established by illegal interference with interstate commerce even where the interference is "minimal" or "slight, subtle or even potential." *Id.*

3. In rejecting Petitioner's argument that this Court's decision in *Lopez* requires a heightened showing of an effect on interstate commerce, the Second Circuit ruled that *Lopez* "did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution" and "did not affect [the Act's] *de minimis* standard." *Id.* To support that interpretation of *Lopez*, the Second Circuit found similar interpretations in its own precedents, as well as in precedents of five sister Circuits – the 7th, the 9th, the 10th, the 11th, and the D.C. Circuits. But the Second Circuit did not claim that *Lopez* or any of the Circuit cases can be read as approving the use of speculative inferences to satisfy the *de minimis* standard of the Hobbs Act.

4. In footnote 5 of the Second Circuit's opinion, App. 12, *infra*, the court wrote that "Our cases have made clear that while the jurisdictional threshold is minimal, the Government still must offer some evidence of an effect on interstate commerce. . . . Where the Government has failed to present any such evidence, we have of course found that the jurisdictional element has not been satisfied." But the Second Circuit failed to identify or assess the evidence offered by the Government in this case that might demonstrate that the robberies at the Chelsea Parking Garage did indeed have "an effect on interstate commerce."

5. The Second Circuit opinion treats this case as one in which the so-called minimal "jurisdictional element of

the Hobbs Act" is an evidentiary matter for jury determination. The court accordingly views Petitioner's claim as a simple one of "insufficient evidence." And in execution of its *de novo* review of an "insufficient evidence" claim, says the court, "we review the evidence 'in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government, and may overturn the conviction only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " App. 12-13, *infra*.

6. Using that standard of appellate review, the Second Circuit concluded that the Government's evidence at trial "was more than sufficient to establish a 'minimal' effect on interstate commerce and therefore to satisfy the jurisdictional element of the Hobbs Act." App. 13, *infra*. That evidence, said the court, showed that "the Garage regularly served cars bearing out-of-state license plates, mostly from New Jersey and Connecticut, and that the Garage is located near major access routes for cars crossing state lines." *Id*. From that "evidence," said the court,

> The jury could easily have drawn the *inference* that the Garage is utilized by commuters and others traveling to and from Manhattan across state lines, and that robberies of cars from the Garage could discourage such travel. [Emphasis added]. *Id*.

Thus the court was able to use a mere inference that "could easily have [been] drawn" by the jury as adequate proof of the Hobbs Act minimal jurisdictional requirement. And it is upon that supposed jury-drawn inference, supposedly expressed in the jury's verdict of guilty on

the Hobbs Act charges, that Petitioner's criminal conviction now rests.

REASONS FOR GRANTING THE WRIT

More than 35 years ago, this Court observed that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' " *Stirone v. United States*, 361 U.S. 212, 215 (1960). The Court added that a charge of interfering with commerce, in whatever way or degree, "is critical since the Federal Government's jurisdiction of this crime rests only on that interference." *Id.* at 218.

The Second Circuit's decision in this case raises several important questions about the proper roles of judge and jury in determining the existence of at least a minimal "degree" of interference with interstate commerce. They are questions of jurisdictional and constitutional significance. They deserve the plenary attention of this Court.

1. The decision below raises an important question whether the jurisdictional and constitutional limits of the Hobbs Act should be determined by a jury or by an appellate court's *de novo* evaluation.

The Second Circuit, in this case, has relegated to the jury the function of determining from the evidence

whether the jurisdictional and constitutional limits of the Hobbs Act have been satisfied. Under that view, only the sufficiency of the evidence submitted to the jury is reviewable by an appellate court.

That ruling of the Second Circuit directly conflicts with this Court's long-standing rule that an appellate court must make "an independent evaluation of constitutionality under the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. at 1631 (1995). See also *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (appellate court has a *de novo* obligation to examine whole record to guard against intrusion into free speech area); *United States v. Appalachian Power Co.*, 311 U.S. 377, 403-4 (1940) (this Court has a *de novo* obligation to determine whether a particular waterway is navigable so as to be subject to Congress' interstate commerce power).

The Second Circuit has made no effort to perform such an "independent evaluation." Instead, it treats the jurisdictional requirement as an evidentiary matter to be submitted to, and resolved by, the jury. Thus, in the court's words, the jurisdictional requirement is satisfied if

> . . . the Government presented the jury with sufficient evidence to establish Hobbs Act jurisdiction. In reviewing a claim of insufficient evidence, we view the evidence "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government, and may overturn the conviction only if no rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. *United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996).[4]

App. 12-13, *infra*; 122 F.3d at 149. And since at least a minimal "degree" of interference with commerce is necessary to sustain both the jurisdictional and the constitutional justifications of this Hobbs Act prosecution, something more than a jury's verdict of guilty is needed. A jury, no matter how well instructed, simply is not a body of constitutional or jurisdictional experts capable of evaluating the evidence on such juridical matters.

True, the Second Circuit did exercise its duty to review *de novo* a constitutional claim that the Commerce Clause, as interpreted by this Court in *Lopez*, requires more than a *de minimis* effect on commerce. App. 10-12, *infra*. The claim was denied. Petitioner does not now renew that claim before this Court. The sole claim now in issue relates to the Second Circuit's abdication to the jury of the task of evaluating the sufficiency of the evidence to support the constitutional and jurisdictional underpinnings of the Hobbs Act. And the fact that the Second Circuit found that the evidence submitted to the jury was "more than sufficient to satisfy the jurisdictional element of the Hobbs Act," App. 13, *infra*, is no substitute for the court's own obligation to review and evaluate such facts *de novo*.

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[4] The cited *Hernandez* case, however, did not involve the Hobbs Act or its jurisdictional limitations. Rather, *Hernandez* was a simple exercise in determining whether there was sufficient evidence to support convictions under federal perjury and obstruction of justice statutes. Those statutes contain no jurisdictional elements. *See* 85 F.3d at 1030; discussion at headnote 15.

Consider the constitutional and jurisdictional questions the Second Circuit might have resolved had it performed its *de novo* obligation in this case:

(1) Are there any limits to the *de minimis* or the "any way or degree" of commerce obstruction outlawed by the Hobbs Act? How far into the remote or tiny areas of obstruction did Congress intend to go? Do the legislative findings and debates, or the committee reports, shed any light on these matters?

(2) Does the Hobbs Act bear any implicit or constitutional limitations with respect to areas of criminal law enforcement where the States historically have been sovereign? In this case, does the fact that New York City is fully capable of arresting and prosecuting Petitioner for the state offense of stealing autos from a local garage have any bearing on what constitutes the outer limits of the Hobbs Act?

(3) Have we reached the point, in the application of the Hobbs Act to minuscule or inferential interferences with commerce, where "we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"? *United States v. Lopez*, 115 S.Ct. at 1632. Or, as District Judge Sprizzo stated in this very case, "If [the Government's] argument is carried to its logical extreme, then every robbery in a supermarket parking lot would also come under the Hobbs Act because there are interstate cars there." Hearing Tr. at 17.

(4) However well charged, the jury was not told to return any special verdict on whether the garage was an interstate facility, or whether the robberies affected commerce "in some way." The jury merely returned a guilty

verdict on two counts of the indictment, without explanation of its views on the jurisdictional or constitutional matters.

As a result, the Second Circuit was forced to speculate that the jury "could easily have drawn the inference that the Garage is utilized by commuters and others traveling . . . across state lines, and that robberies of cars from the Garage could discourage such travel." App. 13, *infra*. But there is no way of knowing whether the jury did draw that inference. In any event, a possible jury inference is no substitute for an appellate court's *de novo* and independent review of the evidence. See *United States v. Robertson*, 514 U.S. 669, 115 S.Ct. 1732 (1995), where this Court's *de novo* review of the facts led to the conclusion that a gold mine was "engaged" in interstate commerce, thereby reversing a *de novo* determination of the Ninth Circuit that the mine "affected" interstate commerce.

(5) Under a *de novo* approach, the Second Circuit conceivably could have assessed the interstate character of the Chelsea Parking Garage, from which the cars were stolen, as "an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947), citing Justice Holmes' opinion for the Court in *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). In other words, from the normal economic and business point of view, was the Chelsea Parking Garage anything more than a local parking garage, in which a few out-of-state cars were parked? From that point of view, was the accessibility of the garage to interstate travelers and the relationship of such parked cars to the interstate character of the garage, so "casual and incidental," *United States v. Yellow Cab Co.*,

supra at 231, as to render the garage a local enterprise, subject only to the State's sovereign powers? Add the fact that this garage had none of the interstate advertising and other interstate characteristics that marked the motel in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964).

(6) Finally, unless reversed, the Second Circuit's opinion will become a dangerous precedent for substituting a jury verdict of guilt for an appellate court's duty to provide a *de novo* review of the constitutional and jurisdictional facts. Any appeal by the criminal defendant becomes limited, as the Second Circuit says, to a claim that "no rational trier of fact [the jurors] could have found the essential elements of the crime [the constitutional and jurisdictional elements] beyond a reasonable doubt." App. 13, *infra*. Such an appeal is virtually guaranteed to fail. The only alternative then would be for this Court to provide a *de novo* review of such constitutional and jurisdictional facts, but without the benefit of the Second Circuit's view of the facts.

All these matters and arguments are beyond the competence of a jury. They could and should have been addressed by the Second Circuit in exercise of its *de novo* obligation to review constitutional and jurisdictional facts. The decision below should be reviewed.

2. The decision below raises an important question whether a local crime coming within the general police power of a State can be converted into a Hobbs Act violation by means of an unarticulated jury inference.

The Second Circuit's decision demonstrates on its face that it accepted the jury's general verdict of guilt as sufficient evidence that the jury, having been charged on the basic commerce aspects of the Hobbs Act,

> could easily have drawn the inference that the Garage is utilized by commuters and others traveling to and from Manhattan across state lines, and that robberies of cars from the Garage could discourage such travel. The evidence was more than sufficient to establish a "minimal" effect on interstate commerce and therefore to satisfy the jurisdictional element of the Hobbs Act.

App. 13, *infra*.

A fair reading of those two sentences reveals that the entire Hobbs Act application in this case rests on the jury's "could have drawn" inferences. It could have drawn the inference that the garage was an interstate facility because of evidence that some interstate travelers and commuters parked their cars there. And the jury could have drawn the inference – although there was no supporting evidence whatever – that there was an interference with interstate commerce since the robberies of locally owned automobiles "could discourage" interstate travel that ended by parking at this garage.

Thus virtually all the constitutional and jurisdictional aspects of the Hobbs Act, as applied in this case, rest

solely on jury inferences. And those inferences are apparent only in the minds of the Second Circuit, for the jury did not articulate them in rendering its general verdict of guilty.

What was said by this Court in *United States v. Lopez*, 115 S.Ct. at 1634, is fully applicable to this case:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To do so would require us to conclude . . . that there will be a distinction between what is truly national and what is truly local . . . This we are unwilling to do.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eighth day of October, one thousand nine hundred and ninety-seven.

USA

Appellee,

v

Farrish

Defendant-Appellant.

Dkt No: 97-1057

(Filed Oct. 8, 1997)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Major Glenn Farrish.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

DATE: August 27, 1997

Re: USA v. Farrish

Docket No(s).: 97-1057

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been AFFIRMED.

Judgment was entered on August 27, 1997, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form [is enclosed herewith,] [has been forwarded under separate cover,] and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17(8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified

bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,

GEORGE LANGE III, Clerk

By: /s/ Daryl Eason
Daryl Eason
Case Manager, USCA

App. 5

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1943 – August Term, 1996

(Argued: August 6, 1997 Decided: August 27, 1997)

Docket No. 97-1057

UNITED STATES OF AMERICA,

Appellee,

v.

MAJOR GLENN FARRISH, AKA GLENN, AKA GLENN FARRISH,

Defendant-Appellant.

Before:

CALABRESI, CABRANES, and PARKER,

Circuit Judges.

Appeal by defendant from a final judgment of the United States District Court for the Southern District of New York (John E. Sprizzo, *Judge*) convicting him, after a jury trial, on two counts of violating the Hobbs Act, 18 U.S.C. § 1951. Defendant argues principally that the Government failed to satisfy the jurisdictional element of a Hobbs Act prosecution.

Affirmed.

M. KATHERINE BAIRD, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New

York, Craig A. Stewart, Assistant United States Attorney, New York, NY, on the brief) *for Appellee.*

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York, NY (Erica T. Dubno, on the brief) *for Defendant-Appellant.*

JOSÉ A. CABRANES, Circuit Judge:

In this appeal, we address whether the Supreme Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), raised the threshold for satisfying the jurisdictional element of the Hobbs Act, 18 U.S.C. § 1951 ("Hobbs Act" or "Act").[1] We hold that *Lopez* did not alter the long-standing rule that the Government need only demonstrate a *de minimis* effect upon commerce in order to establish jurisdiction under the Act.

I.

A jury convicted Major Glenn Farrish ("Farrish" or "appellant") on March 8, 1996 on two counts of violating

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[1] The Hobbs Act provides in pertinent part that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a).

the Hobbs Act by stealing cars, on two occasions, from the Chelsea Parking Garage ("Garage") in Manhattan. Viewing the evidence presented at trial in the light most favorable to the jury's finding of guilt, as we must in this challenge to the sufficiency of the evidence, *see United States v. Sirois*, 87 F.3d 34, 36 (2d Cir.), *cert. denied*, 117 S. Ct. 328 (1996), the facts are as follows.

The Garage is located at 170 West 23rd Street. Twenty-third Street is a major east-west thoroughfare easily accessible from both the Holland and Lincoln Tunnels. The Garage has between 100 and 105 parking spots, approximately 80 of which are reserved for customers who enter into monthly parking contracts. At the time of the robberies at issue in this case, approximately 35 to 40 of these monthly customers parked cars bearing out-of-state license plates, mostly from New Jersey and Connecticut. Many of these customers, however, lived or worked in New York. About 20 percent of the daily customers who parked at the Garage drove cars bearing out-of-state license plates, again primarily from New Jersey and Connecticut.

The first robbery of the Garage took place on April 15, 1995. Sandro Santos, the lone parking attendant working at the Garage that evening, testified that three men entered the Garage around 10:00 p.m. Two of them approached his office, and one of the men kicked the office door open. The man whom Santos later identified as Farrish rushed in, took $60 from Santos's pockets, and removed $500 from a desk drawer. Santos was ordered into the bathroom by one of Farrish's confederates. After the three men had left the Garage, Santos discovered that a black BMW 750IL was missing.

The following day, Michael Barnett, a confidential government informant, contacted Farrish and asked him if he could procure a Mercedes-Benz for a customer Barnett claimed to have lined up. Farrish told Barnett that he could not, but that he could provide him with a black BMW. Under the direction of the Federal Bureau of Investigation ("FBI"), Barnett arranged to meet Farrish and to purchase the BMW for $5,500. On April 19, accompanied by an FBI agent, Barnett drove to meet Farrish. He handed Farrish the money and took possession of the car. It was the same vehicle stolen from the Garage the night of April 15.

On April 30, 1995, the Garage was again robbed, this time losing three cars. This robbery was similar to the April 15 robbery. Two men entered the Garage during the early morning hours. One of them kicked in the parking attendant's office door and pushed attendant Vincent Sarmiento to the wall. One of the men brandished a knife and the other a gun. Sarmiento was pushed into the bathroom. When he emerged later, the robbers were gone, and so were an Acura, an Audi, and a Mercedes-Benz. Both Santos and Sarmiento later identified Farrish from a police photographic array as one of the men who had robbed the Garage.[2] Police arrested Farrish on September 12, 1995.

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[2] At trial, however, Sarmiento was unable to identify Farrish.

II.

By its terms, the Hobbs Act applies to any person who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion." 18 U.S.C. § 1951(a). Its reach has been held to be coextensive with that of the Commerce Clause of the United States Constitution.[3] *See Stirone v. United States*, 361 U.S. 212, 215 (1960). Appellant argues that the Commerce Clause requires more than a *de minimis* effect on interstate commerce to trigger Hobbs Act jurisdiction, and that the evidence in this case was insufficient to meet that standard. Appellant's claim that *Lopez* changed the jurisdictional requirement of the Hobbs Act presents a question of law that we review *de novo, see United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir.1997) (concluding "as a matter of law" that Hobbs Act requires only minimal effect upon interstate commerce), as we do his challenge to the sufficiency of the evidence, *see United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir.), *cert. denied*, 117 S. Ct. 1713 (1997).

Our cases have long recognized that "[t]he jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice." *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir.1981) (internal citations omitted); *see also United States v. Jones*, 30 F.3d 276, 285 (2d Cir.1994) (holding that Hobbs

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[3] The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Act jurisdiction is established by illegal interference "in any manner whatever with interstate commerce, even when the effect of such interference or attempted interference is minimal"); *Jund v. Town of Hempstead*, 941 F.2d 1271, 1285 (2d Cir.1991) (stating that "any interference with or effect upon interstate commerce, whether slight, subtle or even potential . . . is sufficient to uphold a prosecution under the Hobbs Act").

Appellant, however, contends that the Supreme Court's decision in *Lopez*, which held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) ("Section 922(q)"), unconstitutionally exceeded Congress's power under the Commerce Clause, *Lopez*, 115 S. Ct. at 1631, compels this Court to read the jurisdictional element of the Hobbs Act as requiring a heightened showing of an effect on interstate commerce. In *United States v. Leslie*, we addressed a similar *Lopez*-based challenge to a federal money laundering statute.[4] We noted that the Hobbs Act's jurisdictional standard is *de minimis*, and we explained that "[s]ince *Lopez*, courts interpreting the Hobbs Act (from which the money laundering statute derived its language) have continued to hold that *Lopez* did not affect this *de minimis* standard." *Leslie*, 103 F.3d. at 1100. Accordingly, we held that *Lopez* had not altered the money laundering statute's analogous jurisdictional element. *Id.* We now expressly hold that *Lopez* did not raise

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[4] The money laundering statute challenged in *Leslie*, 18 U.S.C. § 1956(a)(3)(B), applies to financial transactions which "in any way or degree affect[ ] interstate or foreign commerce." *See Leslie*, 103 F.3d at 1100 (quoting 18 U.S.C. § 1956(c)(4)).

the jurisdictional hurdle for bringing a Hobbs Act prosecution. As suggested in *Leslie*, our sister Circuits that have addressed this question have all so held. *See Castleberry*, 116 F.3d at 1387 (11th Cir.1997); *United States v. Harrington*, 108 F.3d 1460, 1467 (D.C.Cir.1997); *United States v. Atcheson*, 94 F.3d 1237, 1241-43 (9th Cir.1996), *cert. denied*, 117 S. Ct. 1096 (1997); *United States v. Bolton*, 68 F.3d 396, 398-99 (10th Cir.1995), *cert. denied*, 116 S. Ct. 966 (1996); *United States v. Stillo*, 57 F.3d 553, 558 n. 2 (7th Cir.), *cert. denied*, 116 S. Ct. 383 (1995).

The statute at issue in *Lopez* represented a generalized attempt by Congress to regulate gun possession in the vicinity of schools, without regard to whether individual instances of gun possession were connected in some way to interstate commerce. The Court emphasized that Section 922(q) "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the [criminal act] in question affects interstate commerce." *Lopez*, 115 S. Ct. at 1631. The Court distinguished it from a federal gun possession statute that it had previously upheld in *United States v. Bass*, 404 U.S. 336 (1971), noting that unlike the statute in *Bass*, Section 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 115 S. Ct. at 1631. In sharp contrast to the statute at issue in *Lopez*, the Hobbs Act does contain just such a jurisdictional element that "limit[s] its reach" to a "discrete set" of robberies or acts of extortion that have an "explicit connection with or effect on interstate commerce." That is, the Act is not directed to all robberies and acts of extortion on a theory

that all such acts affect interstate commerce, but rather, by its terms, it applies only to those acts which themselves can be shown to affect interstate commerce. In sum, the Court in *Lopez* itself distinguished statutes such as the Hobbs Act which require a particularized jurisdictional showing. We find nothing in *Lopez* to suggest that the Court intended to heighten the threshold for establishing jurisdiction under such statutes. Accordingly, we reaffirm that to satisfy the jurisdictional element of the Hobbs Act, the Government need only show a "minimal" effect on interstate commerce. *See Jones*, 30 F.3d at 285.[5]

In the instant case, we find that the Government presented the jury with sufficient evidence to establish Hobbs Act jurisdiction. In reviewing a claim of insufficient evidence, we view the evidence "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government, and may overturn the conviction only if no rational

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[5] Our cases have made clear that while the jurisdictional threshold is minimal, the Government still must offer some evidence of an effect on interstate commerce. *See Leslie*, 103 F.3d at 1103 ("There is nothing more crucial, yet so strikingly obvious, as the need to prove the jurisdictional element of a crime."). Where the Government has failed to present any such evidence, we have of course found that the jurisdictional element has not been satisfied. *See, e.g., United States v. Pinckney*, 85 F.3d 4, 7 (2d Cir.1996) (reversing a conviction under the Anti Car Theft Act where "[t]he government failed to produce any evidence, circumstantial or otherwise, of a connection between [the defendant's] activity and interstate commerce"); *Leslie*, 103 F.3d at 1102-03 (reversing conviction on one of two counts of violating the federal money laundering statute because, as to that count only, there was no evidence of an effect on interstate commerce).

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir.1996). The evidence presented at trial showed that the Garage regularly served cars bearing out-of-state license plates, mostly from New Jersey and Connecticut, and that the Garage is located near major access routes for cars crossing state lines. The jury could easily have drawn the inference that the Garage is utilized by commuters and others traveling to and from Manhattan across state lines, and that robberies of cars from the Garage could discourage such travel. The evidence was more than sufficient to establish a "minimal" effect on interstate commerce and therefore to satisfy the jurisdictional element of the Hobbs Act.

We have considered all of appellant's other claims, and we find them to be without merit.

III.

We conclude that the Supreme Court's decision in *Lopez* did not alter the showing required to satisfy the jurisdictional element of the Hobbs Act, and that the evidence put forward by the Government in this case was sufficient to establish Hobbs Act jurisdiction.

Accordingly, the judgment of conviction is affirmed.